13

APR 21 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1942

No. 948

ANTONIO STORNELLI

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Second Circuit, and Brief in Support of Petition.

T. CARL NIXON,
Attorney for Petitioner,
31 Exchange Street,
Rochester, New York.

Dated, April 19, 1943.

CASPER V. BALTENSPERGER, Rochester, N. Y.
WENDELL J. BROWN, Chicago, Ill.
Counsel.

Daily Record Company,
Rochester, New York.

SUBJECT INDEX

	Page
Petition for writ of certiorari	
Summary and short statement of matter involved	1
Basis of jurisdiction	3
Questions presented	3
Statutes involved	2, 3
Reasons relied on for the allowance of the writ	4
Prayer for writ	5
Brief in support of petition for writ of certiorari	
Opinion of court below	865
Statement of case	8
Questions presented	7
Statutes involved	8
Argument	
Point I	12
Point II	16
Point III	22
Conclusion	24

TABLE OF DECISIONS AND CITATIONS

Title	Page
Amberg vs. Kinley, 214 N. Y. 531	20
Bellows vs. Merchants Despatch Transportation Co., 257 N. Y. App. Div. 15	20

Title	Page
Bertles vs. Nunan, 92 N. Y. 152	15
Burke vs. Witherbee, 98 N. Y. 562	17
Dittiger vs. Isal Realty Corp., 264 N. Y. App. Div. 279	19
Galeota vs. United States Gypsum Co., 123 Fed. 2d. 947, cert. den. 315 U. S. 813	24
Homin vs. Cleveland & Whitehill Co., 281 N. Y. 484	20
Kirby vs. Montgomery Brothers & Co., 197 N. Y. 27	17
Leppard vs. O'Brien, 225 N. Y. App. Div. 162, affd. 252 N. Y. 563	15
Martin vs. Herzog, 228 N. Y. 164	20
Mautsewich vs. United States Gypsum Co., 217 N. Y. 593	12, 18
Michalek vs. United States Gypsum Co., 76 Fed. 2d. 115, modified 298 U. S. 639	16, 18
Miller vs. Town of Irondequoit, 243 N. Y. App. Div. 240, affd. 268 N. Y. 578	15
Pieczonka vs. Pullman Co., 89 Fed. 2d. 353	15
Schmdit vs. Merchants Despatch Transportation Co., 270 N. Y. 287	16, 18
Shepard vs. Taylor Publishing Co., 234 N. Y. 465	21
Teller vs. Prospect Heights Hospital, 280 N. Y. 456	20
Transit Comm. vs. Long Island R. R. Co., 253 N. Y. 345	15
20 Amer. & Eng. Ency. of Law, 2d. Ed., 1902, Master & Servant, p. 58	21
39 Corpus Juris, Master & Servant, Sec. 488, p. 371	21

Drinker & Hatch, Industrial Dust, McGraw-Hill Book Co., 1936, pp. 43, 60 13

Sutherland Statutory Construction, Sec. 371 15

Webster's New International Dictionary, 2d. Ed., 1934.. 13

STATUTES CITED

Section 240 (a) Judicial Code 3

Section 417 New York Labor Law 2, 12, 14, 24

Section 299 New York Labor Law 17

Section 200 New York Labor Law 19

Section 202 New York Labor Law 20

Section 48, Subdivision 2 New York Civil Practice Act 2, 8, 16

Section 49, Subdivision 6 New York Civil Practice Act 3, 16, 25

Section 4 New York Labor Law of 1890 (Chap. 394 L. 1890) 13

Section 122 New York Labor Law of 1897 (Chap. 415 L. 1897) 14

Section 122 New York Labor Law of 1907 (Chap. 399 L. 1907) 14

Section 122 New York Labor Law of 1909 (Chap. 36 L. 1909) 14

Supreme Court of the United States

OCTOBER TERM, 1942

No.....

ANTONIO STORNELLI
vs.
UNITED STATES GYPSUM COMPANY,
Petitioner.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Second Circuit.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of the United States Gypsum Company for a writ of certiorari to review the decision of the United States Circuit Court of Appeals, Second Circuit, rendered March 16, 1943, affirming a judgment in favor of the plaintiff-appellee, which judgment was entered in the United States District Court for the Western District of New York on September 10, 1942 for $5,154.52 damages and costs, respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff because of breach of statute of the defendant during the plaintiff's employment in the defendant's gypsum mine in Genesee County, New York. The plaintiff claims that a lung condition described as silicosis or "industrial fibrosis" was aggravated by his exposure to free silica dust during the last year of his employment which was from April 1929 to April 1930.

The cause of action is based solely upon alleged violations of Sec. 417 of the Labor Law of the State of New York which the plaintiff claims creates a "statutory" cause of action separate and distinct from a common law cause of action for negligence. No issues involving common law negligence were submitted to the jury.

The matters here involved are:

(1) Whether Sec. 417 of the New York Labor Law applies to this case, where the injury is wholly based upon an alleged inhalation of dust, since the statute refers only to the removal of "smoke and noxious gases" and does not refer in any way to the removal of dust.

(2) Whether the action was commenced within the time limited by the New York statute of limitations as "an action to recover upon a liability created by statute" (six years from the accrual of the cause of action) or whether it was barred by the New York statute of limitations as "an action to recover damages for a personal injury, resulting from negligence" (three years from the accrual of the cause of action).

The following statutes are involved:

Sec. 417 of the *New York Labor Law:*

> Ventilation. An air current sufficient to remove smoke and noxious gases and to insure the safety of every employee shall be conducted along every passageway and working place.

Sec. 48 of the *New York Civil Practice Act:*

> Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:
>
> * * * * * * *
>
> 2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

Sec. 49 of the *New York Civil Practice Act:*

> Actions to be commenced within three years. The following actions must be commenced within three years after the cause of action has accrued:
>
> * * * * * * *
>
> 6. An action to recover damages for * * * a personal injury, resulting from negligence.

(3) Whether the plaintiff was entitled to succeed without showing that he was actually exposed to free silica dust at the places he worked in the mine, the proof being limited to the statement that there was a small amount of free silica in the rock at some indefinite point in the mine, which was not connected up with any place the plaintiff worked.

BASIS OF JURISDICTION

This Court has jurisdiction of this petition by virtue of Sec. 240 of the Judicial Code as amended (28 U. S. C. A. Sec. 347), which provides as follows:

> Certiorari to circuit courts of appeals and United States Court of Appeals for District of Columbia; appeal to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal.

QUESTIONS PRESENTED

(1) Does Sec. 417 of the New York Labor Law apply to this case since it omits any reference to dust.

(2) Is the cause of action herein an action "to recover upon a liability created by statute" or is it a common law action to recover damages for "a personal injury, resulting from negligence."

(3) Was there substantial evidence that the plaintiff was exposed to free silica dust.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) The Court erred in holding that Sec. 417 applied to this case, since the statute makes no mention of dust and the Court was not justified in reading dust into it.

(2) The Court in determining that the action was not barred by the three year statute of limitations necessarily held that Sec. 417 of the New York Labor Law created a "statutory" cause of action which was separate and distinct from a common law action to recover damages for a personal injury resulting from negligence. Such a holding is in conflict with decisions of the New York courts in respect to quite similar provisions of the New York Labor Law.

(3) The Court erred in deciding that there was substantial proof that the plaintiff was exposed to free silica dust. Not only was there no testimony that there was free silica dust in the *air* at any point in the mine, but there was utterly no testimony that the plaintiff ever worked at any point in the mine where there was free silica dust in the surrounding *rock* which was being worked, nor that he worked at any point in the mine where the air current could carry such dust to him. This case may be followed by other courts in similar cases not only in New York State but in other States.

The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial pro-

cedure, and has sanctioned such departure by the District Court, so as to require an exercise of this Court's power of supervision.

To accept the Circuit Court's position is to say that plaintiffs in this type of action—wholly involving dust—may base a cause of action upon a statute which makes no reference to dust; avoid the three year statute of limitations which has usually been accepted in personal injury actions, and hold an employer as an insurer *pro tanto* without any substantial proof that such plaintiffs were actually exposed to any harmful dust at any time in issue.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of this Honorable Court directed to the United States Circuit Court of Appeals, Second Circuit, commanding such Court to certify and send to the Supreme Court a transcript of the record of the proceedings in the United States Circuit Court of Appeals, Second Circuit in the above matter for its review and determination pursuant to the provisions of law applicable thereto, to the end that said decision of the Circuit Court of Appeals may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just.

Respectfully submitted,

T. CARL NIXON,
Attorney for Petitioner,
31 Exchange Street,
Rochester, New York.

Dated: April 19, 1943.

CASPER V. BALTENSPERGER, Rochester, N. Y.
WENDELL J. BROWN, Chicago, Ill.
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

ANTONIO STORNELLI

vs.

UNITED STATES GYPSUM COMPANY

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The decision of the United States Circuit Court of Appeals, Second Circuit, in this action has not yet been reported. A copy of the decision is annexed to this brief.

This is a petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals, Second Circuit, affirming a judgment of the United States District Court, Western District of New York, in favor of the plaintiff in the sum of $5,154.52.

The questions presented in this brief are:

(1) Does Sec. 417 of the New York Labor Law apply to this case since it omits any reference to dust.

(2) Is the cause of action herein an action "to recover upon a liability created by statute" or is it a common law action to recover damages for "a personal injury, resulting from negligence" which is barred by the New York statute of limitations.

(3) Was there substantial evidence that the plaintiff was exposed to free silica dust.

Statutes Involved

(See p. 2 of Petition)

Statement of Case

The plaintiff was employed in the gypsum mine of the defendant near the Village of Oakfield, New York from about 1914 (p. 133) to about April 1930. (P. 52.) The action was commenced in April 1935, which, by the Court's application of the New York six year statute of limitations (Sec. 48, Subd. 2, New York Civil Practice Act, set forth at p. 2 of the petition herein) limits the employment for which the defendant could be held responsible to the one year period from April 1929 (six years prior to the commencement of the action) to April 1930 (the last day of employment, p. 494). The plaintiff testified that during this time he was employed as a loader and sometimes as a driller using an electric auger drill; that during his employment there was much dust created by the various drilling operations (p. 135) which was not dispersed or carried away because the defendant shut off its ventilating fan each day for a time and failed to maintain proper circulation in other respects. (Pp. 152; 150.) Briefly, the testimony of the defendant was that the mine was ventilated by a huge fan of constant speed (pp. 390-391) which pushed approximately 100,000 cubic feet of air per minute into the mine. (P. 391.) This air was driven through the working places in the mine, went through the entire mine and out the entrance shaft, there being no other way for the air to get out. (Pp. 391-392.) The fan was located in a housing on the surface. (Photograph, defendant's Exhibit I, p. 535.) The defendant conceded that there was some dust created by the various drilling operations and introduced photographs showing the various drills, stationary and in operation. Exhibit C (p. 527) shows the electric drill in operation. (P. 393.)

Exhibit B (p. 525) shows the same drill not being operated. Exhibits T and U (pp. 543, 545) show the same electric drill again in operation at different heights in the face of the gypsum. (Pp. 453, 455.) During a period in 1931 for the purpose of reducing the overhead, the defendant experimented with a type of air drill. (Pp. 394, 395.) It did not work out and was abandoned in a few months. (See reasons—not dust, pp. 399; 400.) Exhibit D (p. 529) shows such a drill operating. (P. 395.) The exhaust from the drill can be seen coming out in the form of vapor from a hole on the front end of the machine. (Pp. 395, 397.)

The only other type of drill was a "jackhammer" operated by compressed air and used solely for an operation known as brushing roof rock. (Pp. 397, 398.) This drill is shown in operation in Exhibit L. (P. 541.) It is undisputed that plaintiff never used either of the air drills. (P. 399.) The brushing operation was done only to make more head room along the motor roads. It was never used for the drilling of gypsum in the rooms themselves, so that the amount of roof rock drilled was relatively minor. (P. 402.) The roof rock which was brushed was limestone containing not more than 3.6% free silica. (P. 188.) The defendant conceded that the two air drills made dust (pp. 397, 399) but also testified that it rapidly settled to the floor because it was wet, heavy and coarse. (P. 397.) The mine was wet (Pp. 400, 401.) Four pump rooms were maintained with a capacity of 28 million gallons a day. (P. 401.) In the wet season about 16 to 20 million gallons per day. (P. 401.)

After the gypsum was removed from the working faces it was loaded onto small cars, shown on Exhibits K and E (pp. 539, 531) and taken down the main haulageway and hoisted to the surface. A typical abandoned room is shown in Exhibit A (p. 523) and in Exhibit 14. (Pp. 519; 89; 92.)

In 1928—two years before plaintiff left the employment of the defendant, he opened a grocery store in Oakfield. His wife ran it while he continued to work at the mine. (P. 53.) From April 1930, when he left defendant's employ, he continued to operate the store until the present time. (P. 164.) About nine months prior to the trial he also took a job in the nearby mine of the Phoenix Gypsum Company where he was still working at the time of the trial averaging over $40.00 per week. (P. 161; Exhibit J, p. 537.) This was $5.00 more per week than he had made at the United States Gypsum Company. He claimed he did light work in the Phoenix mine. (P. 155.)

Plaintiff had been employed by the defendant for sixteen years (pp. 133; 52) but his exposure in issue was limited to one year at the end of his employment—from April 1929 to April 1930. (P. 314.) He claimed a pre-existing condition of silicosis had been aggravated by his employment during that one year. His only medical witness (Dr. Carnivale) saw him for the first time almost 12 years after the employment ceased. (P. 250.)

This expert medical witness for the plaintiff, in answer to a hypothetical question, stated that plaintiff's employment for the one year was a competent producing cause of the conditions she found (p. 273) and that plaintiff had pneumoconiosis due to the inhalation of dust. (P. 278.) She later stated upon persistent questioning by the trial judge that she couldn't be sure of the type, but finally made a diagnosis of silicosis (p. 311) and "moderate industrial fibrosis." (P. 314.) Concededly, silicosis can come only from the inhalation of free silica dust. (P. 278.)

The term "moderate industrial fibrosis" was coined by her and she knew of no other medical person who used it. (Pp. 302, 303.)

Between the date the employment ceased in 1930 and the time of the trial in 1942, the plaintiff's only medical attention was by "a man and woman" whose names he could not recall (p. 171) whom he saw three times, including his visit to Dr. Carnivale whom he first saw January 19, 1942. (P. 250.)

A chemist called by the plaintiff to prove that he was exposed to free silica testified he had gone into the mine to find samples with free silica in them (p. 192); that some samples from one point were obtained which contained from .3% to 3.6% of free silica. This, however, was only approximate. (P. 203.) He could not recall whether he took the samples from a main haulageway or from a room, or it might have been a cross cut or maybe even at the entranceway going into a room, or it might have been a motor road. (P. 203.) He admitted that samples taken at one point would not necessarily show the same chemical analysis as samples taken as little as 200 feet away, and that the free silica content might vary 2 or 3% (p. 203); that in the air of any busy city he would expect to find free silica to the extent of 12%. (P. 201.)

No proof was offered concerning the amount of free silica dust in the air which could be breathed by the plaintiff, nor that the plaintiff was working at or anywhere near the place from which the chemist took his samples. Nor was there any testimony that even the small amount of free silica found in the samples (the largest one was in roof rock) would have been suspended in the air so that it could be breathed. Nor was there any proof whatsoever that the dust which the plaintiff's witness described was not composed entirely of gypsum particles. The uncontradicted testimony of the defendant is that pure gypsum dust is harmless. (Pp. 337; 340; 315.)

POINT I

Section 417 of the Labor Law does not apply since it makes no reference to the removal of dust.

The pleading in this case—as submitted to the jury—was based wholly upon a liability created by Sec. 417 of the Labor Law. That section provides as follows:

> Ventilation. An air current sufficient to remove smoke and noxious gases and to insure the safety of every employee shall be conducted along every passageway and working place.

Sec. 417 makes no mention of dust. The first portion of the statute refers only to "An air current sufficient to remove *smoke and noxious gases.*" There is no claim in this case that plaintiff's condition was due to *smoke* or *noxious gases.* If he had any condition, it was caused by dust and could not have been caused by anything else.

Unless we are to assume that "smoke and noxious gases" includes dust, the sole duty of defendant was to maintain an air current sufficient "to insure the safety of every employee" along every passageway and working place. But such an admonition does not create a "statutory" cause of action. It is general in character. It has specifically been held by the New York Court of Appeals to merely "supplement the common law rules * * *." (*Mautsewich vs. United States Gypsum Co.*, 217 N. Y. 593, 598.) Thus no cause of action, other than in common law negligence could have been based upon it.

The Court below has read the word "dust" into the statute and has stated its reasons as follows:

> Air, filled with the dust of powdered rock, is within this language; to deny to it the name of 'noxious gas' would disregard the plain purpose of the Act; and indeed, even if we were disposed to be literal, air is a gas, and air filled with finely comminuted particles of rock

> is a noxious gas, just as air filled with finely comminuted particles of partly burned wood is smoke. (Opinion, p. 867.)

But air is not commonly understood to be a gas, and the addition of dust does not make it one. *Webster's New International Dictionary*, 2d. Ed. 1934, among the definitions of gas states:

> 2. In popular usage, any gas, or gaseous mixture, with the exception of atmospheric air; specif.: *a* Any gas used to produce anesthesia, as laughing gas (nitrous oxide) or ethylene. *b* Any combustible gaseous mixture used for illuminating or as a fuel; as, natural *gas*, coal *gas*, etc.

The definition of dust in the same authority is:

> 1. Fine dry pulverized particles of earth or other matter; that which is crumbled to minute portions; fine powder; as, clouds of *dust;* bone *dust*.

The inherent properties of gases and dusts are so different that the legislature could not have intended to include dust in the statute. Commonly encountered gases are lighter than air and tend to rise. Dust is heavier than air and falls to the ground unless stirred up by an air current. This is particularly true of free silica (quartz). (Spec. grav. 2.66, *Drinker & Hatch "Industrial Dust"*, (McGraw-Hill Book Co., 1936, pp. 43; 60.) The legislature never intended that the air current required was to remove or disperse dust. It was aimed directly at the matters mentioned—smoke and gases.

Sec. 417 has its origin in the *Labor Law of 1890*. (Chap. 394, Sec. 4.)

Sec. 4 provides:

> The inspector shall examine into the manner of the ventilation of all mines, and shall see that the ventilating current shall be conducted and circulated to and

> along the face of each and every working place throughout the entire mine in sufficient quantities to insure the removal of powder, smoke and other noxious gases, to such an extent that all working places and traveling roads shall be in a safe and fit state to work and travel therein.

In 1897 (Chap. 415, *Laws of 1897*, Sec. 122) the word "powder" was dropped and the materials to be removed by the air current limited to "smoke and noxious gases." This phraseology was continued through the amendments of 1907 (Chap. 399, Sec. 122) and 1909. (Chap. 36, Sec. 122.) In 1921 the present Sec. 417 was enacted as part of the new *Labor Law of New York*. (Chap. 31, *Consolidated Laws*, L. 1921, chap. 50.)

It seems obvious that the word "powder" was dropped from the statute in 1897 as being unnecessary since it could refer only to powder smoke from blasting which was covered by the phrase "smoke and other noxious gases" anyway. But nowhere throughout the long history of Sec. 417 does the word "dust" appear. This is not strange for two reasons—first, possible dangers from certain types of dust were not recognized generally until about ten years ago and therefore could not have been in the minds of the legislature. Second, the true purpose of an air current is not to remove dust from the mine anyway, since no practical volume of air would do so.

Moreover, a statute must be strictly construed. Obviously, an air current sufficient to remove *smoke and noxious gases* might not be sufficient to remove *dust*. And in construing a statute which so changes the common law rule as to "create" a new cause of action and which also increases the common law liability, the Court should not give it broader scope than its plain meaning imports.

> If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will

be strictly construed. A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable. The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act.

Miller vs. Town of Irondequoit, 243 N. Y. App. Div. 240, 242, affd. 268 N. Y. 578.

Sutherland Statutory Construction, Sec. 371.

Leppard vs. O'Brien, 225 N. Y. App. Div. 162, 164, affd. 252 N. Y. 563.

A similar rule of statuory construction is that

> Rules of the common law are to be no further abrogated than the clear import of the language used in the statute absolutely requires.

Transit Comm. vs. Long Island R. R. Co., 253 N. Y. 345, 355.

Bertles vs. Nunan, 92 N. Y. 152, 158.

In *Piecconka vs. Pullman Co.*, 89 Fed. 2d. 353, 356, the Court was considering Sec. 299 of the Labor Law which provides for the elimination and removal of harmful substances including *dust* from the air in *factories*. There, it was claimed that the statute should be construed so as to include a cabinet. The Court said:

> * * * the meaning should be plain, and though we ought to construe it favorably, we are not warranted in adding features not specified. A hood and fan is not a hood and fan *and* a cabinet; * * *.

Likewise, an air current sufficient to remove smoke and noxious gases is not an air current sufficient to remove smoke and noxious gases and *dust*.

POINT II

Section 417 of the Labor Law does not create a statutory cause of action separate and distinct from a common law action for negligence. If any cause of action is alleged, it is barred by the statute of limitations.

The statute of limitations applicable to a negligence cause of action is three years from the last employment. (*Michalek vs. United States Gypsum Co.*, 76 Fed. 2d. 115; modified 298 U. S. 639; *Schmidt vs. Merchants Despatch Transportation Co.*, 270 N. Y. 287; *New York Civil Practice Act*, Sec. 49, subd. 6.)

The plaintiff was last employed in April 1930 and the action was commenced in April 1935.

The statute of limitations applicable to a statutory cause of action is six years from the last employment. (*Michalek vs. U. S. Gypsum Co.*, 76 Fed. 2d. 115; modified 298 U. S. 639; *Schmidt vs. M. D. T. Co.*, 270 N. Y. 287; *New York Civil Practice Act.* Sec. 48, Subd. 2.)

If the action here is one to recover damages at common law for "a personal injury, resulting from negligence" it is barred. (*New York Civil Practice Act.* Sec. 49, Subd. 6.) If it is one "to recover upon a liability created by statute" it is not barred. (*New York Civil Practice Act*, Sec. 48, Subd. 2.) The statutes are set forth herein at p. 2 of petition.

It is the contention of the petitioner that Sec. 417—the sole basis of liability—is merely declaratory of the common law and does not create any liability which did not exist at common law in New York at the time the statute was enacted. Long prior to that time the employer was under a duty to furnish a reasonably safe place to work and was liable in negligence for an injury to his employee caused by breach of this

duty. (*Kirby vs. Montgomery Brothers & Co.*, 197 N. Y. 27, 31.) This included the duty to furnish reasonably safe appliances. (*Burke vs. Witherbee*, 98 N. Y. 562, 565.) The plaintiff now contends that a new or statutory cause of action has been created which was unknown to the common law.

No Appellate Court, either Federal or State, has passed upon this question as applied to Sec. 417, other than in the case at bar. The *Michalek* and *Schmidt* cases (supra) dealt with motions based upon complaints which alleged Sec. 299 of the Labor Law as a basis of liability. Sec. 299 after stating the *general* duty of an employer to provide *factory* work rooms with

> * * * proper and sufficient means of ventilation, natural or mechanical or both, as may be necessary, * * * and proper and sufficient ventilation and proper degrees of temperature and humidity * * * (Subd. 1.)

sets forth *specific* and *detailed duties* concerning what shall be done about machinery creating dust or impurities. Subd. 2 of the statute states as follows:

> All machinery creating dust or impurities shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dust or impurities; such fan shall be kept running constantly while such machinery is in use * * *.

Subd. 3 is even more specific and detailed. It provides:

> If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any work room of a factory in quantities tending to injure the health of the employees, suction devices shall be provided which shall remove such impurities from the work room, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released.

These last subdivisions—2 and 3—the New York Court of Appeals held created a statutory cause of action "which would not exist but for the statute." (*Schmidt vs. M. D. T. Co.*, supra, p. 305.)

In the *Michalek* case (supra) the Circuit Court of Appeals split, the majority holding that Sec. 299 did not create a statutory cause of action. The dissenting opinion, which held that a statutory cause was created, points out that the pleading was based upon Subdivision 2, (p. 118, *Michalek* case) and it was apparently assumed in both cases that Subdivision 1 added nothing to the general common law duty of the employer to provide a safe place to work. The *Michalek* case was later modified by this Court to conform with the holding of the New York Court of Appeals in the *Schmidt* case. (298 U. S. 639.) Sec. 299 applies only to a factory and does not apply to a mine. Therefore, it does not bear upon this case except as a measure of comparison.

Sec. 417, unlike Subdivisions 2 and 3 of Sec. 299, merely restates the common law duty of a mine operator to provide ventilation in a mine. It is, therefore, similar to Subdivision 1 of Sec. 299 which restates the common law duty to provide ventilation in a factory.

Nor did the legislature intend something greater than the common law duty to provide a safe place to work when the word "insure" was used in Sec. 417. This word could not have been used in the sense that an employer was the insurer of every employee from all the hazards accompanying mine ventilation regardless of the facts—as would seem to be indicated by the opinion below. (Opinion, p. 868.) In *Mautsewich vs. United States Gypsum Company*, 217 N. Y. 593 (the cause of action arose prior to the passage of Sec. 417 in its present

form, but was practically identical so far as the use of the word "insure" was concerned) the Court stated: (P. 598.)

> The legislature, by directing the commissioner of labor to see that every necessary precaution is taken to insure the safety and health of employees employed in the mines and quarries and in the construction of tunnels of the state and to prescribe rules and regulations therefor, intended to supplement the common-law rules relating thereto and thereby further to insure the safety of those employed in such dangerous employments.

Other statutes quite similar to Sec. 417 have been held by New York courts not to create a statutory cause of action, but to be merely declaratory of, or to supplement the common law. For instance, Sec. 200 of the Labor Law provides that all working places

> * * * shall be constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein.

In the late New York App. Div. case of *Dittiger vs. Isal Realty Co.*, 264 A. D. 279, the Court, speaking of Sec. 200, stated: (P. 281.)

> It is evident, therefore, that the rule of the statute is merely declaratory of the common law to the extent that it imposes on the employer the use of reasonable care. * * * This section is general in character and does not impose the duty of providing any specific safeguard. In this respect it differs from statutes such as section 299 of the Labor Law, violation of which may constitute a cause of action, irrespective of negligence. (See *Schmidt vs. Merchants Despatch Trans. Co.*, 270 N. Y. 287, 304.)

In *Bellows vs. Merchants Despatch Transportation Co.*, 257 N. Y. App. Div. 15—a silicosis action—the Court stated: (P. 16.)

> Section 200 of the Labor Law provides in effect that the employer must provide his employees with a safe place to work and with adequate tools and appliances. It cannot be claimed that this provision is indefinite because that was the common law duty of an employer. *Mautsewich v. United States Gypsum Co.*, 217 N. Y. 593, 597 * * *.

In a late case involving the "window cleaning statute" (Sec. 202, New York Labor Law) a complaint was held to be defective where the cause of action was based solely upon the violation by the defendant of its duty to carry out "the provisions of the Labor Law of the State of New York, the Industrial Code and the Rules of the Industrial Board of the State of New York, to provide anchors attached to the side frames of the windows." Sec. 202 in part states the person in charge of a building must provide "approved safety devices on all windows of such building." But the Court dismissed the complaint, pointing out that the specific allegation of violation of duty was limited to the failure to provide anchors, and that since this is not specifically required by the statute, but only by one of the rules of the Industrial Board "the complaint cannot be so construed as to permit the cause of action to depend upon the statute alone." (*Teller vs. Prospect Heights Hospital*, 280 N. Y. 456, 459.) It was also pointed out that there was no allegation of negligence in the complaint, but "Had the cause of action been based on negligence, violation of a statute might constitute negligence as a matter of law. (*Amberg vs. Kinley*, 214 N. Y. 531, 535; *Martin vs. Herzog*, 228 N. Y. 164; *Schmidt vs. M. D. T. Co.*, supra.)"

In the later case of *Homin vs. Cleveland & Whitehill Co.*, 281 N. Y. 484, the Court again stated that a complaint simi-

lar to the one in the *Teller* case was defective (although dismissed on a different ground) pointing out that "Violation of a statute, without other evidence, constitutes evidence of negligence * * *."

Unlike Subdivisions 2 and 3 of Sec. 299, Sec. 417 does not provide for the installation of any specific devices and, in fact, as shown in the preceding point, does not even mention "dust."

A controlling test in determining whether a statute "creates" a liability is whether the liability is one "which would not exist but for the statute." In *Shepard vs. Taylor Publishing Co.*, 234 N. Y. 465, 468, it is stated:

> A statute 'creates' no liability unless it discloses an intention express or implied that from disregard of a statutory command a liability for resultant damages shall arise 'which would not exist but for the statute.'

An employer, long before the advent of Sec. 417 was under a common law duty to provide a safe place to work which included ventilation in a mine. The general rule is laid down at 20 *Amer. & Eng. Ency. of Law*, 2d Ed., 1902, *Master & Servant*, p. 58 as follows:

> A master who is engaged in the business of mining is bound to use reasonable care to make the place of work reasonable safe. He must, therefore, use reasonable care to ventilate the mine in order to prevent the accumulation of poisons and explosive gases.

And in 39 *Corpus Juris*, *Master & Servant*, Sec. 488, p. 371:

> It is the common law duty of the operator to use ordinary care to furnish sufficient ventilation in the mine for the safety of his employees.

POINT III

There is no substantial evidence that the plaintiff was exposed to free silica dust.

The plaintiff claimed he was injured by the inhalation of *free silica* dust in the mine of the defendant. To lay a basis for such a claim he had to prove that such dust was present where he would breathe it. The plaintiff testified that at certain times there was much dust in the air at or near the places where the plaintiff worked. (P. 135.) The plaintiff's chemist—retained to find such samples of rock in the mine as would be highest in free silica content (p. 192)—testified that he obtained samples and after pounding them with a hammer into some smaller form found upon analysis that they contained from .3% to 3.6% free silica, which was only approximate (p. 203); that he could not recall whether he took the samples from the main haulageway or from a room, or from a cross cut or maybe even at the entranceway going into a room, or it might even have been a motor road (p. 203); that samples taken at one point in the mine would not necessarily be the same as samples taken as little as 200 feet away, and that the free silica contents of such samples might vary as much as 2 or 3%. (P. 203.) There was utterly no testimony that the plaintiff worked at, or anywhere near the indefinite place from which the samples were taken nor that he worked between that place and the fan so that dust might be borne to him along the air current. Nor was there any testimony as to the type of dust contained in that described by the plaintiff.

It was conceded by the plaintiff's physician that silicosis can come only from the inhalation of free silica. (P. 278.) The dust described by plaintiff may have been composed entirely of gypsum dust which is considered harmless by the great weight of medical authority. (P. 315.)

The time in issue here is the last year of the plaintiff's employment—April 1929 to April 1930. (P. 314.) He claimed an aggravation during that period of a pre-existing condition. To recover for that aggravation he had to show that he was in a place where he would breathe this dust during that period. This he utterly failed to do.

To say that there was a small amount of free silica in the rock at one point in the mine and that the plaintiff worked somewhere in the same mine—which may have been a mile away (p. 227)—is not proof that there was free silica dust in the air where the plaintiff could breathe it. Nowhere is there any testimony that the rocks in the mine in general contained any amount—however small—of free silica. We respectfully contend that this gap should not be bridged—as was done by the Court below—by concluding that since there was some "unimpressive" medical testimony that the plaintiff had silicosis and that at some place in the mine silica formed a "small part" of the rock, the "conclusion was almost inevitable" that he acquired his silicosis because of his work in the mine. (Opinion, p. 869.) Certainly, the plaintiff could not establish that he contracted his condition in the defendant's mine simply by showing that he had worked there and that he had the condition, unless he showed conclusively that he had never been exposed at any other place to free silica dust. Not only did he fail to do this, but it was affirmatively shown that after he left the employment of this defendant, he worked for five months in a nearby gypsum mine (p. 158) before his medical witness saw him for the first time on January 19, 1942 (p. 250) and that she based her diagnosis of his condition and the aggravation sustained in the last year of his employment, not only upon his entire employment with the defendant, but

all of his history up to the time she first examined him. Plaintiff's chemist testified that in the air of any busy city he would expect to find free silica to the extent of 12%. (P. 201.)

It has been claimed that the case of *Galeota vs. United States Gypsum Co.*, 123 Fed. 2d. 947, 2d. Circuit, 1941, cert. den. 315 U. S. 813, is authority for a holding that the plaintiff need not show that the plaintiff was definitely exposed to free silica dust. All that the *Galeota* case held was that where it was shown that the plaintiff drilled in concentrations of rock containing free silica he need not further show by an analysis of the air borne dust that there was actually free silica dust in the air. However, although the samples were the same in the *Galeota* case, the proof was quite different. The Court there pointed out that "there was proof that he was drilling in formations which contained substantial amounts of silica. * * *" But in the case at bar there was *no proof* that he was drilling in such formations or was anywhere near formations containing any amount of free silica. But here, the Court in the case at bar, has gone much further. It holds that under New York law all the plaintiff need show is that he worked in a mine where at one indefinite point there was a small amount of free silica; that many years after leaving his employment he was found to have a "condition" caused by silicosis and "repeated respiratory infections" without negativing exposure elsewhere and where the "repeated respiratory infections" were not linked up to his employment.

Conclusion

It is, therefore, submitted: (1) that the statute upon which liability was predicated (Sec. 417 of New York Labor Law) was improperly applied to this case; (2) that if it was prop-

erly applied, the liability created was one in common law negligence and was barred by the three year statute of limitations (Sec. 49, Subd. 6), and (3) that the plaintiff wholly failed to connect the condition complained of to his employment with the defendant, and that for those reasons no cause of action was made out against this defendant.

The questions here presented are fundamental in this case and are also present in numerous other cases of a like nature pending not only the United States District Court for the Western District of New York, but also in several cases now pending in the New York Supreme Court. A careful consideration of them by this Court is therefore warranted. The proof required to establish a case is also of considerable importance not only in cases pending against this defendant, but also in numerous dust cases pending against other employers in various courts in New York State. Moreover, it is likely that the courts of other States will follow the decision in this case. Thus petitioner respectfully contends that this Court should review the decision of the United States Circuit Court of Appeals in order that it may be reversed.

Dated April 19, 1943.

Respectfully submitted,

T. CARL NIXON,
Attorney for Petitioner,
31 Exchange Street,
Rochester, New York.

CASPER V. BALTENSPERGER, Rochester, N. Y.
WENDELL J. BROWN, Chicago, Ill.
Counsel.

Opinion of United States Circuit Court of Appeals for the Second Circuit

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 165—October Term, 1942

(Argued February 5, 1943 Decided March 16, 1943.)

ANTONIO STORNELLI,

Appellee,

—*v.*—

UNITED STATES GYPSUM COMPANY,

Appellant.

Appeal from a judgment of the District Court for the Western District of New York in an action to recover for injuries suffered by the plaintiff through the defendant's violation of §417 of the New York Labor Law.

Before:

L. HAND, SWAN and CHASE,

Circuit Judges.

CASPER V. BALTENSPERGER, for the appellant.

WILLIAM L. CLAY, for the appellee.

L. HAND, *Circuit Judge:*

The defendant appeals from a judgment in an action to recover for injuries suffered by the plaintiff while in its employ. Its liability, if any, must be confined to the violation of §417 of the New York Labor Law because that was all that the judge left to the jury. The plaintiff had worked in the defendant's gypsum mine from some time in 1914 until April 1930, as a "loader" or "driller." His own testimony, confirmed by that of two fellow workmen, was that during this time, the drifts and headings where he worked were constantly filled with clouds of dust caused by the pulverization of rock by drills and other machinery; and that, being forced to breathe such atmospheres, he suffered a disease of the lungs, known as pneumoconiosis, which was the injury for which he sued. The defendant had set up a large fan at the mouth of the mine, designed to blow the dust out of the galleries and headings, but according to the testimony of the plaintiff's witnesses, it did not do so for various reasons not necessary to detail. Although the defendant denied that dust in any serious amount was left in the mine, upon that issue the verdict is conclusive in the plaintiff's favor. The action was brought in April 1935, five years after the plaintiff left the defendant's employment. Sub. 6 of §49 of the New York Practice Act makes three years the period of limitation for "an action to recover damages for * * * a personal injury, resulting from negligence"; and sub. 2 of §48 makes six years the period for "an action to recover upon a liability created by statute, except a penalty or forfeiture." The first question is which of these periods is the right one; the second question, and the only other one of any consequence, is whether the plaintiff proved that he was injured by breathing dust during the only year for which at most he could recover—from April 1929 to April 1930.

Section 417 of the New York Labor Law, which is applicable to mines, provides that "an air current sufficient to remove smoke and noxious gases and to insure the safety of every employee shall be conducted along every passageway and working place." Air, filled with the dust of powdered rock, is within this language; to deny to it the name of "noxious gas" would disregard the plain purpose of the Act; and indeed, even if we were disposed to be literal, air is a gas, and air filled with finely comminuted particles of rock is a noxious gas, just as air filled with finely comminuted particles of partly burned wood is smoke. That being assumed, we may take *Schmidt v. Merchants Despatch Trans. Co.*, 270 N. Y. 287, as an authoritative exposition of the applicable period of limitation. That decision turned upon the meaning of sub. 2 and sub. 3 of §299 of the New York Labor Law; of which the first required "all machinery creating dust or impurities" to "be equipped with proper hoods and pipes connected to an exhaust fan of sufficient * * * power to remove such dust"; and the second required that "suction devices shall be provided which shall remove * * * impurities * * * by means of proper hoods connected to conduits and exhaust fans." The court held that these enactments were for the benefit of those employees who might be exposed to the danger of breathing dust, and that they "created" a "liability" within sub. 2 of §48 of the Civil Practice Act, as distinguished from giving support to a finding that the employer had failed to exercise the care that he should have: *i.e.*, been guilty of "negligence."

We see no difference between "hoods," "pipes" and a "fan" "of sufficient power" (or "hoods," "conduits" and "exhaust fans," which "shall remove"), and "an air current sufficient to remove smoke and noxious gases," except that in the first the means of producing the "air current" is prescribed, and in the second it is left to the employer. In each case the critical consideration is that the statute has prescribed pre-

cautions for the benefit of the employees, which the employer fails to observe at his peril. However careful he may have been, he is liable for any injury resulting from not conforming his behavior to that enjoined; he is made an insurer *pro tanto*. That creates a different liability from failing to provide employees with a safe place to work: the two may overlap; they may in a given instance coalesce; but they are quite different commands. It is true that we think of that common-law duty as though it were imposed before the event, because it demands only "reasonable" care; but that does not specify the conduct required and creates a duty incapable of being known in advance, and it is ascertained and imposed only retroactively. Our excuse is that it is fair to exact conformity to such a standard because it should be the inherited portion of the actor; although never formulated before—being measured by a unique occasion—he will divine it by intuition. Nor is it derived alone from forecasting the probable course of events, though that enters into it. It involves a matching of human interests: it is "legislation" *in parvo*. That is not true of duties such as that before us; the conflict of interest has already been resolved; the employer must provide the "air current," cost what it may; the current's power is measured only by what it will do; if it prove not enough to remove the "noxious gases," the employer must pay.

The distinction is well illustrated by *Teller v. Prospect Heights Hospital*, 280 N. Y. 456, in which the court dismissed the complaint as insufficient in law on its face. It had alleged that the employee had been injured through the employer's failure "to provide anchors" on the frames of windows which he had to clean; but it did not allege that "reasonable care" required these to be installed. Hence it was bad as a declaration at common-law, just because it did not invoke a standard measured by balancing the cost of prevention against the risk to the sufferer. On the other

hand the pleader could point to no unconditional and peremptory command that the employers should install anchors. We need not decide whether a statute, which imposed a duty upon employers measured in the same terms that the common-law measures their duty, would "create" a "liability" under sub. 2 of §48 of the New York Civil Practice Act, or whether the action would remain one "to recover damages * * * for a personal injury resulting from negligence" under sub. 6 of §49. Section 417 of the Labor Law has nothing to do with "negligence" in the sense that that word is used in sub. 6 of §49 of the Practice Act.

There remains only the question whether there was evidence to support a verdict that the plaintiff had suffered any injury from inhaling "dust or noxious gases" between April 1929 and April 1930. The defendant's argument as to this is that the ailment of which he complained could only be produced by silica dust, and there was no evidence that his lungs had been in the least silicified. There was however ample evidence that he had constantly inhaled dust, that this dust was made of powdered rock, and that, certainly at some places in the mine, silica formed a part of the rock, though only a small part. It was possible for the jury to conclude that constant breathing of the powdered rock, no matter how small a percentage of the dust was composed of silica would result in partially silicifying the lungs; and if there was evidence that it had done so, the conclusion was almost inevitable that this had happened while the plaintiff was in the defendant's employ. That his lungs had been to any extent silicified four doctors and one skiagrapher denied; and they were all well qualified. Against them the plaintiff called only a single doctor, a woman who had however specialized in diseases of the chest. Read in print, her testimony is not indeed impressive, but after a long and thorough cross examination, she persisted in standing her ground that, taking the history of the plaintiff's illness, the

X-ray films, the conditions to which he was exposed, and his state of health when she examined him, he was suffering from the dust which he had inhaled, and that he had some silicosis. And, she added, he had more than silicosis. Finally, this condition was aggravated by the dust which he inhaled during the last year of his employment.

But even were there no sufficient basis for the conclusion that the plaintiff had silicosis at all, and were we to throw out the testimony of his doctor altogether, a jury had support in finding that he had a disease of the lungs. How far that disease was caused by breathing dust for sixteen years and how much of the damage was done in the last year, were indeed debatable, but no one could say that reasonable people must deny all connection between them. The jury was clearly entitled to find that during the year in question he had suffered some injury and the amount of the verdict is not reviewable by us at all. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 483-485.

Judgment affirmed.



(17)

FILED
MAY 21 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1942.

No. 948.

ANTONIO STORNELLI,

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WILLIAM L. CLAY,
Attorney for Respondent,
510 Powers Building,
Rochester, New York.

Dated: May 19th, 1943.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

PAGE

Statement of the Case 2

POINT I.

The Labor Law of the State of New York required the defendant to provide an air current sufficient to insure the safety of its employees..... 5

POINT II.

Under the New York State Labor Law Section 417, and New York Civil Practice Act, Section 48, Subdivision 2, the plaintiff was entitled to the benefit of a six year statute of limitations..... 11

Decision of the Court in the Hegierski case..... 14

TABLE OF DECISIONS.

Downing vs. Oxwell Acetylene Co., 169 Atl. 709.....10, 11

Erie Railroad Co. vs. Tompkins, 304 U. S. 64, 58 S. Ct. Rep. 817 13

Galeota vs. United States Gypsum Company, 123 Fed. 2nd 947, Cert. den. 315 U. S. 813.....8, 10, 13

Hegierski vs. United States Gypsum Company, New York Supreme Court, Unreported 12, 13

Mautewich vs. United States Gypsum Company, 217 N. Y. 593 .....7, 8

Michalek vs. United States Gypsum Company, 298 U. S. 639 .....11, 12, 13

Schmidt vs. Merchants Despatch Transportation Co., 270 N. Y. 287 .....7, 11, 13



Supreme Court of the United States

October Term, 1942.

No. 948.

ANTONIO STORNELLI,
vs.
UNITED STATES GYPSUM COMPANY,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Antonio Stornelli, for his Brief in opposition to the Petition for a Writ of Certiorari to review the Judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled action, affirming the Judgment of the United States District Court for the Western District of New York respectfully shows:

1. That the Decision here by the Circuit Court of Appeals for the Second Circuit, is not in conflict with the Decision of any other Circuit Court of Appeals in the same matter.

2. That the United States Circuit Court of Appeals for the Second Circuit in its Decision herein, has not decided

any important question of local law in conflict with the applicable local decisions.

3. That there is no important question of Federal Law herein concerned which has not hitherto been decided or which requires any settlement thereof by this Court.

4. That the Decision of the Circuit Court of Appeals for the Second Circuit herein, is not in conflict with applicable decisions of this Court.

5. That the Circuit Court of Appeals for the Second Circuit in its decision herein has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such departure, thus there is no reason for this Court to exercise its power of supervision herein.

Statement of the Case.

The respondent herein was employed by the petitioner in its mines at Oakfield, Genesee County, New York and while there employed and as a result of his employment he sustained lung injuries because of the failure on the part of the employer-petitioner herein, to provide a suitable and proper air current to remove impure air laden with noxious dusts (Fols. 170, 173, 213, 221), with the result that the respondent's lungs were invaded by silica and other dusts causing the respondent to receive substantial personal injuries, taking the form of a physical condition known as pneumoconiosis and industrial fibrosis. (Fols. 770, 771, 755, 757, 749, 780, 781, 786, 818.)

To recover damages for these injuries, the plaintiff sued and a jury, sitting in the United States District Court for

the Western District of New York, rendered a verdict in favor of the respondent on all of the issues in the action and awarded him money damages which as reduced by the Trial Court, amounted to Five Thousand Dollars, for which sum Judgment was duly entered.

The defendant-petitioner appealed and after argument by counsel for both parties, and after a careful examination of the law and facts, the United States Circuit Court of Appeals for the Second Circuit, duly handed down its Opinion (copy of which is annexed to the petition), affirming the judgment.

The case presented for the determination of the jury, questions of fact as to the defendant's liability for the injuries sustained and as to the defendant's failure to comply with section 417 of the Labor Law of the State of New York. The verdict arrived at by the jury was fully justified both upon the issues of the defendant's failure to comply with the provisions of the New York State Labor Law, and upon the medical proof, and certainly no unusual circumstances were presented, calling for, or justifying or requiring intervention by the Supreme Court of the United States. The Judgment of Affirmance by the United States Circuit Court of Appeals was by a unanimous Court, the opinion being written by Hon. Learned Hand, Circuit Judge.

There are no questions in this case which are of particular importance or concern, and the verdict of the jury is that in an ordinary personal injury action. The plaintiff in his work was exposed to large quantities of silica and other dusts generated in the mining operations carried on in the defendant's mine. He worked in rooms of ap-

proximately three foot six to four feet in height (Fol. 405) had no protective device of any kind given him by the defendant, (Fol. 231) and the air current which was supplied to the mine did not function in a proper manner on various occasions because of the fact that doors which were provided across the main passage-ways into the mine and which were supposed to have been kept closed when trains of cars were not running through the mine to take out rock or to bring back the empty cars, were not kept closed on various occasions, and were left open for extended periods by the defendant and its employees, (Fols. 319, 336) with the result that the air current which was generated did not, in many instances, reach the places where the respondent worked at various remote areas of the mine, with the result that large quantitites of silica-laden dust remained in the air for varying periods of time extending into hours on occasions during the working day. (Fols. 170, 336.) The failure to close these doors promptly after trains had passed through instead of hooking them back, permitted the air current to be diverted and to leak back into the general passageway or motor way and to escape out of the entrance shaft instead of going where it should have gone to the remote areas of the mine where these drilling operations were being carried on. (Fol. 213.) The testimony as to the fineness of the silica particles given by Prof. James E. Maynard of Syracuse University (Fol. 542) clearly established that of the free silica portion of the rock, over fifty percent of the particles were under the breathing size of ten microns and capable of being, as a consequence, imbedded when breathed in the alveoli of the respondent's lungs. (Fols. 562, 566, 569, 817.) This testimony was undisputed and although the defendant produced medical proof (Fols. 739-741) that the respondent was not injured by breathing this dust, the respondent produced competent medical proof to

show that he was there injured by breathing this dust, his chest expansion being but 1¼ inches on that account (Fol. 751) and had contracted pneumoconiosis, siliosis and fibrosis. (Fols. 751, 768, 771, 782, 819, 932, 940.)

The testimony of the plaintiff's witness as to the operation of the doors referred to was also practically undisputed. (Fols. 219, 336.)

The issues of the case presented questions of fact for the Jury.

POINT I.

The Labor Law of the State of New York required the defendant to provide an air current sufficient to insure the safety of its employees.

The defendant in its brief, claims that this statute did not require the employer to remove air laden with noxious dusts. Such construction or conclusion is wholly unwarranted. The duty of the defendant under the statute was to provide an air current which was *in fact sufficient to insure the safety of the employees.* It made no difference as to whether or not the defendant exercised reasonable care to do this. *He was required by the statute to do it, and defendant could not excuse itself for not doing it by saying that it exercised reasonable care. Reasonable care to provide suitable ventilation was the test at common law. The duty under the Statute is to provide an air current which shall be in fact sufficient to insure the safety.*

The defendant seeks to bring hair line distinction and say that there is no difference between the duty to exercise

reasonable care and the duty imposed by the statute. Such kind of argument is without effect because of the very language of the statute and the fact that it requires that the air current shall be "sufficient * * * to insure the safety of every employee" (New York State Labor Law, Section 417).

The defendant cannot discharge itself of its duty to this respondent by merely saying that it exercised reasonable care.

All of the cases cited by the defendant as to the common law duty of the employer, it will be noted, have to do with reasonable care.

This is clearly illustrated by the citation in Petitioner's Brief at page 21 as to the Common Law duty wherein the defendant states "A master who is engaged in the business of mining is bound to use reasonable care to make the place of work *reasonably* safe" and again at the same place the defendant quotes from 39 *Corpus Juris* and says, speaking of the common law duty * * * "It is the common law duty of the operator to use *ordinary care* to furnish sufficient ventilation * * *." The use by the defendant of ordinary care to furnish sufficient ventilation satisfied the obligation of the common law. *The statutory obligation is not satisfied in this matter. The use of ordinary care or of reasonable care is immaterial.* The duty is upon the employer to furnish an air current which is *in fact sufficient* (*not to use ordinary care*) *but to furnish sufficient ventilation to insure the safety of this and every employee.* It is readily evident therefore, that the statute created and placed upon the defendant, *a duty substantially greater than the obligation resting upon this defendant under the common law.*

It is also readily apparent that the Legislature certainly had in mind the changing of the common law obligation when it enacted the statute.

This is much more readily apparent because *formerly the statute merely required the Commissioner of Labor to use precautions looking to the safety of the health of employees.*

In the case of

Mautewich vs. United States Gypsum Company, 217 N. Y. 593,

to which counsel refers in his brief (page 18), *the Court of Appeals of the State of New York, did not construe the present statute and its determination in that case construing another previous statute was to the effect that even there the Legislature "intended to supplement the common law rules relating thereto and thereby further to insure the safety of those employed in such dangerous employments."*

This Opinion was written in April 1916, years before the opinion of the same Court of Appeals in the case of Schmidt vs. Merchants Despatch Transportation Company was written in 1935. It is quite likely that had the question been raised in the Mautewich case as to the applicability of the six-year statute of limitation, in the event such a cause of action was properly pleaded as in the Schmidt case, *the Court of Appeals would likewise have determined that the plaintiff there was entitled to the benefit of a six-year statute of limitation. No such question was raised or determined in the Mautewich case, and counsel's statement at page twelve with reference thereto, is misleading and incorrect.* It is true that there the Court of Appeals held that the common law duty was supplemented. Far from being an argument for the defendant, this is most cer-

tainly an argument for the plaintiff *because certainly when the Court of Appeals stated that the common law duty or rules were supplemented, it meant that a new duty had arisen. This new duty is now in a still more forcible form in the present section 417.*

No claim of industrial disease was before the Court in the Mautewich case. The claim there involved was solely as to the employer's liability because of an explosion of dynamite. The Court of Appeals declined to interfere with the verdict of the jury in favor of the plaintiff and here the Circuit Court of Appeals has declined to interfere with the verdict of the jury in favor of this plaintiff against this same defendant. This Supreme Court of the United States has previously declined to interfere with the verdict of the jury in the case of Dominick Galeota against this same defendant, October 1941 term. There is no more reason now than there was then as to why this Court should concern itself with cases of this nature in which the law is now so well established.

It should be noted that the obligation imposed by the Statute is two-fold:

First, the Statute requires that the air current must be sufficient to remove smoke and noxious gases. The Statute *further* requires that the air current must be sufficient to insure the safety of every employee.

Violation of either of these obligations constitutes a breach of the Statute. It was not necessary at all for the Legislature to have said that the air current must be sufficient to insure the safety of employees, if it had only in mind removal of smoke and noxious gases.

The Legislature could well have stopped after it had said that the air current must be sufficient to remove smoke and noxious gases if that was the only obligation it meant to impose.

The argument of the defendant is without weight in this regard. If, for instance, the air current which was provided by the defendant, was contaminated with noxious and poisonous dusts and was circulated to various places in the mine where men were working, the defendant *could not then well be heard to say that the Statute had not been violated.* Here we have a clear and distinct evidence of air poisoned with free silica dust particles of breathing size moving about place to place in the mine *because of the failure of the defendant to remove this silica-laden air by a sufficient air current.*

The duty of the defendant was to provide an air current "sufficient to insure the safety of every employee." *Such an obligation and duty was not discharged by providing an air current laden with silica dust and such an air current certainly was not "an air current sufficient to insure the safety of every employee."* The use of the words "air current" in the Statute certainly *meant an uncontaminated air current and not a contaminated one* and not one contaminated with silica dust. So it is easy to see that the argument of the defendant in this particular regard is without force or effect.

So it makes no difference whether or not air containing dust is a noxious gas or not because separate and apart from that we find in the Statute the language an "air current sufficient to insure the safety of every employee." Certainly the obligation to supply "an air current sufficient to insure the safety of employees" is not met by supplying

an air current contaminated with fine particles of free silica dust of such a size as to be capable of being breathed by employees including this plaintiff, into the respiratory tract, *causing injury and disease for which neither nature nor science has yet been able to provide any cure.*

The Statute is a protective one. It is a humane one, and we are satisfied that this Court is not to be swayed by the play upon words set forth in the brief of the petitioner. Such an argument cannot be sincere, neither can it be sufficient to call upon this great Court to reach down and say that the New York Legislature when it enacted Section 417 of the State Labor Law, did not intend to change the Common Law. Clearly the Common Law has been changed by a wise and beneficent legislature. Clearly the Statute was violated and the plaintiff injured because of the violation; the extent and cause of these injuries being here properly for the jury.

The argument of the defendant as to the necessity of establishing the exact silica content of the air breathed by the plaintiff at particular times, is fully answered by the refusal of this Court to entertain Certiorari in the Galeota case, the same type of argument being used, and the United States Circuit Court of Appeals answering that argument in the reasoning of the Court in

Downing vs. Oxwell Acetylene Co., 169 Atl. 709, in which it was in a well-reasoned opinion determined that where the injurious or poisonous substance is present in the place of employment, it is not necessary for an injured person to prove the amount of the poison or injurious substance present at any particular time *where it appears that the injured party is suffering from a disease caused or engendered by a substance of that same nature.*

Clearly to require the contrary would put the plaintiff in personal injury actions of this nature, to an impossible task. The law neither expects nor requires it and the Downing case is a complete answer to that line of argument, set forth in petitioner's brief at page 22.

POINT II.

Under the New York State Labor Law Section 417, and New York Civil Practice Act, Section 48 Subdivision 2, the plaintiff was entitled to the benefit of a six year statute of limitations.

The argument of the defendant in this respect is to the effect that the plaintiff is not entitled to the benefit of a six-year statute of limitations in cases involving personal injuries to miners, caused by the failure on the part of the defendant to comply with section 417.

This Court has already determined in the case of

Michalek vs. United States Gypsum Company (this same defendant) 298 U. S. 639,

and the Court of Appeals of the State of New York, has already determined similarly in

Schmidt vs. Merchants Despatch Transportation Co., 270 N. Y. 287,

that a working man such as this plaintiff, when injured because of the inhalation of silica dust, has a right to the protection of the six-year statute of limitations, where the State statute with reference to sufficient ventilation has been violated. This Court may recall that the disease of pneumoconiosis is a subtle one and that the disease does not become apparent in many cases until a long time after exposure. In many instances, the plaintiffs in cases of this nature are not able to sue within the ordinary three years

applicable to the usual negligence action under the New York Statute (New York Civil Practice Act Section 49 Subdivision 6), and the Schmidt case was an outstanding illustration of a working man who had been examined twice within the three-year period, the X-rays failing to show the damage done by the silica dust until the third examination, which was had after the expiration of the three years. He brought his action under the New York Statute, claiming that he was entitled to the benefit of the six-year statute of limitation for *breach of his employer of a duty imposed by statute* under the New York Labor Law. *The Court of Appeals held with him, as likewise did this Court hold with the plaintiff Michalek against the United States Gypsum Company, the same defendant, in the case above cited.*

Section 417 of the New York State Labor Law most certainly imposes an additional obligation to that which existed at common law, and for this reason, this plaintiff suing under its provisions, is entitled similarly to the benefit of a six-year statute of limitations. His case was commenced within the six-year peroid.

Section 417 is not declaratory of the common law; the Courts of the State of New York have so held.

Hegierski vs. United States Gypsum Company. Decision of Mr. Justice Hickey in Supreme Court, Erie County, decided April 29, 1943.

In that case the defendant had similarly raised the same question as it did raise here, both in the Trial Court and in the Circuit Court of Appeals. The Supreme Court of the State of New York in the Hegierski case found the contention to be without merit and denied this defendant's application to dismiss the complaint. A copy of the Decision of the Court in that case is annexed hereto.

Under the determination of this Court in

Erie Railroad Company against Tompkins, 304 U. S. 64,

it is our understanding that the United States District Courts are bound to follow the law as laid down by the State Courts in which the United States District Court is located. The Hegierski decision by the Supreme Court of the State of New York, is a complete answer to the argument of counsel for the defendant. The Schmidt case is a complete answer to the argument of counsel, and the Michalek case in this Court, is likewise a complete answer.

Recently this Court, did at the October 1941 Term, deny the petition of this same defendant for a writ of certiorari to the same Circuit Court of Appeals in the action, of Dominico Galeota vs. United States Gypsum Company, No. 893, October 1941 Term. There this Court found that the contentions of this same defendant were without merit in that action brought to recover damages for personal injuries sustained in the same mine at or about the same time by the plaintiff in that action, of whom this plaintiff was a fellow-workman. (Fol. 160.)

It seems to be the policy of this defendant to apply for Certiorari to the Supreme Court of the United States in every case in which it loses the verdict before a trial jury, and the plaintiff's Judgment is affirmed by the United States Circuit Court of Appeals. We feel that the time has come when this Court ought to definitely discourage such applications which are apparently made as a matter of routine by this defendant.

Respectfully submitted,

WILLIAM L. CLAY,
Attorney for Respondent,
510 Powers Bldg.,
Rochester, N. Y.

At a Special Term of the Supreme Court held in and for the Eighth Judicial District at the Erie County Hall in the City of Buffalo, New York, on the 29th day of April, 1943.

Present: Hon. William J. Hickey,
Justice Presiding.

STATE OF NEW YORK.

SUPREME COURT—COUNTY OF GENESEE.

WILLIAM HEGIERSKI, as Administrator of the Estate of John Hegierski, Deceased,
Plaintiff,
vs.
UNITED STATES GYPSUM COMPANY,
Defendant.

The defendant above named having duly moved this Court for an Order under Rule 107 of the Rules of Civil Practice for Judgment dismissing the cause of action set forth in the second amended complaint upon the ground that the said cause of action herein set forth did not accrue within the time limited by law for the commencement thereof, and for such other and further relief as to the Court might seem just and proper, and said Motion having duly come on to be heard before me at a Special Term of this Court appointed to be held in and for the Eighth Judicial District at the Erie County Hall in the City of Buffalo, New York, on the 29th day of April, 1943, and the defendant having appeared by Judd & Stakel, its attorneys in support thereof of said motion, and the plaintiff having appeared by William L. Clay, Esq., its attorney in opposi-

tion thereto, and said Motion having been duly argued and the Court having duly deliberated thereon and having made and filed its decision herein,

Now upon reading and filing the Notice of Motion dated the 19th day of April 1943, the affidavit of Everest A. Judd sworn to the 19th day of April 1943, the affidavit of David W. Daniel sworn to the 17th day of April, 1943, the second amended complaint herein in support of said motion, the affidavit of William L. Clay, Esq., sworn to the 29th day of April 1943 in opposition thereto, it is now, upon motion of William L. Clay, attorney for the plaintiff,

ORDERED that the second amended complaint herein is determined to set forth a cause of action for statutory breach to which the six-year Statute of Limitations provided by the Civil Practice Act of the State of New York applies, an action having been commenced by the decedent within six years from the date of the last employment by the defendant and said action being pending at the time of his death, and the present action having been commenced within two years after the date of the death of the said John Hegierski.

And it is further

ORDERED that the motion of the defendant be and the same hereby is in all respects denied, together with Ten Dollars costs.

Enter:

(Signed) WILLIAM H. HICKEY,
J. S. C.

(Signed) Russell C. Annabal,
Clerk.

O.K. as to
form
W. J. S.



FILED
JUN 14 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1942

No. 948

ANTONIO STORNELLI

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

PETITION FOR REHEARING

T. Carl Nixon,
Attorney for Petitioner,
31 Exchange Street,
Rochester, New York.

Dated: June 11, 1943.

Casper V. Baltensperger, Rochester, N. Y.
Wendell J. Brown, Chicago, Ill.
Counsel.

Daily Record Company,
Rochester, New York.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 948

ANTONIO STORNELLI,

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

PETITION FOR REHEARING

The above named petitioner, United States Gypsum Company, comes before this Court and presents its petition for a rehearing of the petition for certiorari in this case.

JURISDICTION

The petition for certiorari was filed April 21, 1943; and was denied on June 1, 1943. This petition is filed within twenty-five days after the date of denial, under Rule 33 of this Court. (28 U. S. C. A., Sec. 347.)

REASONS FOR PETITION FOR REHEARING

1. The principal question here, is whether Sec. 417 of the Labor Law of the State of New York created a liability by statute governed by a six year Statute of Limitations or whether an action brought because of a violation thereof is one grounded in negligence to which a three year Statute of Limitations applies. The Court below held that the action was one created by statute to which a six year Statute of Lim-

itations applied. The petitioner contended that such a holding is in conflict with decisions of the New York courts in respect to quite similar provisions of the New York Labor Law. (Petitioner's brief, Point II.)

There were no decisions in the New York courts *directly* on Sec. 417 at the time the petitioner's brief was filed, although the first step had been taken to obtain an eventual appellate court decision in a similar case by a pending motion in Special Term in the New York Supreme Court at Genesee County. *(Hegierski vs. United States Gypsum Company.)* This motion had not reached the stage of argument at the time the petitioner filed its brief, but had been argued and decided before the respondent prepared his brief.

The Special Term decided the motion in favor of the respondent, who stressed that decision heavily in his brief upon this petition. (Respondent's brief, pp. 13, 14, 15.) However, respondent did not advise this Court that the order based upon this decision had been appealed, and that it was hoped by petitioner that an authoritative decision of a New York appellate court would ultimately be obtained. The respondent did not serve his brief upon the petitioner's attorneys until June 4, 1943—three days after the petition for the certiorari had been denied by this Court, and thus the petitioner was deprived of its opportunity to so advise this Court by a reply brief. Respondent now cites this Special Term decision as "a complete answer to the argument of counsel for the defendant" (respondent's brief, p. 13) and claims that it is the law of New York State, and that this Court is bound to follow it.

The petitioner intended to file a reply brief when served with respondent's brief, to suggest that this Court hold its decision on the petition for a reasonable time until an opportunity had been had to argue the appeal in at least the Appellate Division of the Supreme Court, and now respect-

fully takes this opportunity to make that request. It should be feasible to argue this question at the September 1943 term of the New York Appellate Division in the Fourth Department.

This question is of great importance to this defendant and petitioner sincerely believes that there is at least a fair possibility that the appellate courts will uphold the petitioner's contention, in which case this Court may see fit to conform to that holding.

PUBLIC IMPORTANCE

The question here, is of public importance since the decision of the Circuit Court of Appeals—being the only decision of an appellate court on the statute—is likely to be followed by the lower courts not only in New York State, but in other states.

For the foregoing reasons petitioner respectfully urges that a rehearing be granted; that upon further consideration the order of June 1, 1943 denying the petition for certiorari be revoked; and that the decision on the writ be reasonably held to provide an opportunity for the appellate courts of New York State to hear the appeal above mentioned, and that the writ of certiorari issue.

Respectfully submitted,

T. CARL NIXON,
Attorney for Petitioner,
31 Exchange Street,
Rochester, New York.

Dated: June 10, 1943.

CASPER V. BALTENSPERGER, Rochester, N. Y.
WENDELL J. BROWN, Chicago, Ill.
Counsel.

I, E. Willoughby Middleton, counsel for the above named petitioner, United States Gypsum Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

E. WILLOUGHBY MIDDLETON,
Attorney and Counsel for Petitioner.